

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

NO. 89-340

Supreme Court, U.S.

FILED

AUG 9 1989

H. E. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUSSELL E. LERMAN,

*Petitioner,*

vs.

CITY OF PORTLAND,

*Respondent,*

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT AND FOR  
SUMMARY REVERSAL

RUSSELL E. LERMAN  
P.O. Box 451  
Dover, New Jersey 07802  
(201) 697-8288  
*Attorney Pro Se*

7092



## QUESTIONS PRESENTED

1. Whether a state legislature can enact a law providing tort immunity to a municipality acting unlawfully?

2. Whether a municipality is absolutely liable under 28 U.S.C. § 1983 for violations of constitutional rights by its Municipal Officers?

2. Whether a dismissal on matters of jurisdiction by a state court on an adversary's motion of a proceeding to review a municipal administrative action is an affirmation on the merits of that action and should be accorded full faith and credit in a federal court?



## INDEX

Questions Presented.....	i
Index.....	ii
Citations.....	iii
Petition for Writ of Certiorari and for Summary Reversal....	1
Opinion Below.....	1
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	2
Statement.....	3
Demolition Order Proceedings.....	3
Illegality of The Order.....	6
Effect of Dismissing the Appeal.....	8
Effect of State Court Decision.....	10
Lack of Jurisdiction in State Court.....	12
Changed Condition of the Building....	14
Public Policy Does Not Burden Victim.....	15
Due Process Nexus on Need to Demolish.....	16
District Court Summary Proceedings...	17
Reasons For Granting the Writ and Summary Reversal.....	20
The District Court and Court Below's Decision Repudiates the Supremacy of the 14TH Amendment and Conflicts With	

This Court and Other Courts of Appeals Application of Cases to Statutory Construction.....	20
The Decision Below Conflicts With Those of This Court and Other Courts of Appeals as to Proper Interpretation of 28 U.S.C. § 1728 and Rule 41(B)....	27
Conclusion.....	29
Appendix.....	30
Court of Appeals Opinion,.....	30
Order Denying Rehearing Petition....	47
Dangerous Building Statute.....	48
Notice of Appeal.....	51
Motion to Dismiss Appeal.....	54
Jury Verdict Form.....	55
Denial of Respondent's Motion.....	56
Me.R.Civ.P. 41(b)(3).....	57

#### CITATIONS

Am.Jur.2d, Judgments v.46, .P.674.....	15
Armstrong v. Manzo, 380 U.S. 545(1965).....	8,16,22
Asalia v. City of Fitchburgh, 29 Mass.App. 13, 505N.E.2d575(1987)...	26
arbier v. Connolly, 113 U.S 27 (1885).....	25
Bilideau v. Soil & Water Conservation Com'n, 383 A.2d 658 (Me.1978).....	12

Bishop v. Inh. of Rowley, 155 Mass. 460, 47 N.E. 191 (Supr.Jud.Ct.1896) .....	24
Bowles v. Willingham, 321 U.S. 503 (1944).....	17
Brightman v. Inh. of Bristol, 65 Me. 426 (1875).....	16
Brown v. United States, 314 F.2d 293 (9th Cir. 1963).....	25
Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984).....	18
Burr v. Town of Rangeley, 549 A.2d 733 (Me. 1988).....	12
Buxton v. Aero Mayflower Transit Co., Inc. 18 FR Serv2d 342(4th Cir. 1974).....	27
Carey v. Piphus, 135 U.S. 247 (1978)...	24
Chavarie v. Robie, 135 Me. 244, 194 A. 404 (1937).....	10
City of Aurora v. Meyer, 308 Ill. 131, 238 N.E.2d 208, (Supr.Ct. 1967).....	16
City of Pittsburgh v. Pivirotto, 502 A.2d 747 (Pa.Cmwlth 1985).....	26
C.J.S., Certiorari, v. 14, p. 219-220.....	10
C.J.S., Judgments, v. 50, p. 92.....	15
C.J.S., Nuisance, v. 66, p. 934.....	16
Clegg v. U.S., 112 F.2d 886 (10th Cir. 1940).....	29

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948).....	21
Costello v. U.S., 365 U.S. 265 (1960).....	28
Cumberland Farms v. Maine Milk Commission, 160 Me. 429, 205 A.2d 539 (1964).....	19
Davis v. Bruk, 411 A.2d 660 (1988).....	13
Davis v. U.S. Steel Supply, etc., 688 F.2d 166 (3d Cir. 1982).....	18
Douglas v. Pike Cty, 101 U.S. 677 (1879).....	25
Evitts v. Lucey, 469 U.S. 387 (1985).....	17, 22
Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).....	25
First Nat'l Bank of Dekalb v. City of Aurora, 71 Ill.2d 1, 15 Ill.Dec. 642, 373 N.E.2d 326 (1978) (1978).....	26
Ford v. Erskine, 189 Me. 164, 83 A. 455 (1912).....	10
Fuentes v. Shevin, 487 U.S. 67 (1972).....	4
Geftos v. City of Lincoln Park, 39 Mich.App. 644, 198 N.W.2d 169 (1972).....	4, 15, 26

Glover v. Housing Authority of City of Bessemer, Ala., 444 F.2d 158 (5th Cir. 1971).....	23
Goldberg v. Kelly, 397 U.S. 254 (1970).....	4
Goldring v. Kline, 284 P.2d 374 (Nev.Supr.Ct. 1955).....	4
Gordan v. Mullaney, A.2d 804 (Me. 1974).....	8
Guaranty Trust Co. of New York v. Martin, 466 F.2d 593 (7th Cir. 1972).....	29
Hannah v. Larche, 363 U.S. 420 (1959).....	4
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....	26
In Re Maine Clean Fuels, Inc. 210 A.2d 736 (Me. 1973).....	4
Ingraham v. Water Co., 82 Me. 336, 19 A. 861 (1898).....	15
027051038 Isely v. Wilkins, 253 A.2d 51 (Me 1969).....	13
Jellerson v. Board of Police of Biddeford, 134 Me. 443, 187 A. 713 (1936).....	10
Jenkins v. McKeithen, 395 U.S. 411 (1969).....	22
Kirkpatrick v, City of Bangor, 510 A.2d 320 (Me. 1986).....	11
Kradoska v. Kipp, 397 A.2d 562 (Me. 1979).....	18.19,20

Kremer v. Chemical Construc- tion Co., 456 U.S. 461 (1982).....	18,20
Lawlor v. National Screen Service cCorp., 349 U.S. 322 (1955).....	12
Leavitt v. Eastman, 77 Me. 117 (1885).....	12
Lerman v. City of Portland 675 F.Supp. 11 (D.Me. 1987)....	1,20,21,22,24
Lerman v. Inh. of the City of Portland, 486 A.2d 903 (Me. 1979).....	9,10,11,19
Lewis v. Mains, 150 Me. 75, 104 A.2d 431 (1954).....	4
Lohman v. General American Life Ins. Co., 478 F.2d 719 (8th Cir. 1973)...	9,27
Loudermill v. Cleveland Bd. of Educ. 721 F.2d 550 (6th Cir. 1983)....	28
Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).....	10
Madden v. Perry, 264 F.2d 169 (7th Cir. 1959).....	27
Maybury v. Madison, 5 U.S. 137 (1803).....	26
Michaud v. City of Bangor, 159 Me. 491, 196 A.2d 186 (Me. 1963).....	8,17,19,23,25,28
Michaud v. City of Bangor, 169 Me. 285, 203 A.2d 617 (1964)....	9,15
Migra v. Warren City School, Dist Bd. of Educ., 465 U.S. 75 (1984).....	19

Miles v. District of Columbia, 510 F.2d 188 (D.C.Cir. 1973).....	17,22
Misurelli v. City of Racine, 346 F.Supp. 42 (E.D.Wis. 1972).....	4
Monell v. New York, 436 U.S. 658 (1978).....	23
Moore v. Bonner, 695 F.2d 794 (4th Cir. 1982).....	28
Morgan v. U.S. 304 U.S. 1 (1938)...	4,6,15
Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).....	4
Mutton Hill Estates v. Town of Oakland, 468 A.2d 989 (Me. 1983).....	8
Newman v. Moyers, 253 U.S. 102 (1920)....	9
Newton v. City of Winston-Salem, 374 S.E.2d 488 (N.C.Ct.App. 1988).....	8,16,17
Noble v. Union River Logging Railroad Co., 147 U.S. 165 (1893).....	9
Owen v. City of Independence, 445 U.S. 622 (1980).....	23
Penbauer v. City of Cincinnati, 475 U.S. 469 (1985).....	23
Penobscot R.R. Co. v. Weeks, 52 Me. 452 (1864).....	13
People v. Common Council, 101 N.Y. 82, 4 N.E. 348 (1886).....	11
Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896 (1988).....	16,23
Preston v. Drew, 33 Me. 558 (1852).....	26

Radney v. Town of Ashland, 188 Ala. 635, 75 So. 25 (Supr.Ct. 1917)...	14
Reed v. Halperin, 393 A.2d 160 (Me. 1978).....	12
Regger v. Linder Shoe Products Co., 241 A.2d 801 (1968).....	27
Ricker v. Wells Sanitary District, No. Cv 84-84 (Me.Super.Ct.York Cty. 1985).....	25
Rizzo v. Goode, 423 U.S. 362 (1976)....	24
Saylor v. Lindsey, 391 F.2d 965 (2nd Cir. 1868).....	28
Semo v. Goudreau, 147 Me. 17, 83 A.2d 209 (1951).....	11,19
Service v. Dulles, 354 U.S. 363 (1985).....	17
Sheiner v. City of New York, 611 F.Supp. 172 (D.N.Y. 1985).....	9
Small v. Pennell, 31 Me. 267 (1850)....	13
South Berwick v. York County Comrs., 98 Me. 108, 56 A. 623 (1903).....	13
St. Peter v. City of Presque Isle, No. Cv 74-144 (Me.Super.Ct. Aro. Cty 1979).....	25,26
Stanley v. Illinois, 405 U.S. 645 (1972).....	16
State v. Sturdivant, 21 Me. 9 (1842).	4,16
Swift v. McPherson, 232 U.S. 51 (1914).	28
Taylor v. Jim Walker Corp, 731 F.2d 266 (5th Cir. 1984).....	25

Thompson v. Whitman, 85 U.S. 457 (1873).....	13
Tibbetts v. Pelotti, 427 A.2d 956 (Me. 1981).....	12
Tippicanoe Beverages v. S.A. El Aquila Brewing Co., 833 F.2d 633 (7th Cir. 1987).....	25
U.S. v. Baltimore & O. Ry, 233 U.S. 454 (1835).....	14
U.S. v. De Pecheco, 20 How. 261 (1856)..<	9
U.S. v. Gomez, 23 How. 326 (1859).....	9
Underwriters Assur. Co. V. North Carolina Guaranty Assn. 465 U.S. 691 (1982).....	18,20
United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987).....	14
United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966).....	20
Village of Zumbrota, 280 Minn. 390, 161 N.W.2d 626 (Supr.Ct. 1968)....	4
West v. City of Borger, 309 S.W.2d 250 (Tex.Ct.Civ.App. 1958) .....	14,16
Whitcomb v. Chaves, 403 U.S. 124 (1974).....	15
Wilson v. Alderhold, 89 F.2d 983 (5th Cir. 1934).....	9
Winters v. Peoples of State of New York, 333 U.S. 507 (1948).....	11

Worcester v. Briggs, 504 A.2d 620 (Me. 1986).....	13
Yates v. Milwaukee, 77 U.S. 497 (1891).....	27

## CONSTITUTION, STATUTES AND RULES

### United States Constitution:

14TH Amendment...	2,10,17,18,20,24,25,26
Article 4, § 1.....	2

### Maine Constitution:

Article 1 § 6-A.....	2,17,26
----------------------	---------

### United States Statutes:

Full Faith and Credit, 28 USC § 1738.....	2,18,20,28
Civil Rights, 42 USC § 1983..	2,10,18,22 23,24,29
Civil Rights, 28 USC § 1343.....	17
Diversity, 28 USC § 1332.....	17
Federal Question, 28 USC § 1331.....	17

### Maine Statutes:

Dangerous Building, 17 M.R.S.A. § 2851.....	2,3,10 17,18,26
Tort Claims Act, 14 M.R.S.A. § 8103.....	3,23,25
Trespass, 14 M.R.S.A. § 7552.....	10,18,22,23 24,25,26

Federal Rules of Civil Procedure:

Rule 36.....	6
Rule 41(b).....	28
Rule 56.....	24

Maine Rules of Civil Procedure:

Rule 3.....	19
Rule 12(b)(6).....	14
Rule 16(d).....	8
Rule 16(h).....	18
Rule 41(b)(3).....	9,18,27,29
Rule 73(a).....	10
Rule 80B.....	10,19

BOCA Basic National Building Code.....	5
--	---



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

No.

RUSSELL E. LERMAN,

*Petitioner,*

vs.

CITY OF PORTLAND,

*Respondent,*

---

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT AND FOR  
SUMMARY REVERSAL

---

Russell E. Russell petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit entered on April 3, 1989 and for summary reversal.

OPINION BELOW

The opinion of the First Circuit Court of Appeals dated April 3, 1989 (infra, pp. 30 to 46) is not reported. The District Court's orders on various pre-trial motions is reported at 675 F.Supp. 11, no opinion was written on the jury verdict entered on January 20, 1988.

## JURISDICTION

The United States Court of Appeals for the First Circuit affirmed the final judgment in the Federal District Court for the District of Maine on April 3, 1989. The Plaintiff-Appellant, Russell E. Lerman's Petition for Rehearing en banc was denied by the United States Court of Appeals for the First Circuit on May 11, 1989, (infra p. 47). Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Maine Dangerous Building Statute, 17 M.R.S.A. § 2851, et seq. (infra pp. 48 to 50).

2. The Fourteenth Amendment to the United States Constitution and Article 1, § 6-A of the Maine Constitution whose meaning is the same and provides in relevant part: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

3. Article 4, § 1 of the United States Constitution and the Act of Congress passed thereunder which is 28 U.S.C. § 1738 which says in part: "Such \* judicial proceedings, \*\* so authenticated shall have the same full faith and credit in every court within the United states \*\* as they have by law or usage in the courts of such state \*\*\* from which they are taken."

4. Civil Rights Act, 42 U.S.C. § 1983 which says in part: "Every person \*\*\* shall be liable."

5. The Maine Tort Claims Act, 14 M.R.S.A. § 8103, which says in part: "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages."

### STATEMENT

#### 1. Demolition Order Proceedings

The Municipal Officers (hereafter 'Council') signed a notice for a hearing on Monday, August 2, 1976. It started an In Rem action against Petitioner's real property, purportedly under the Dangerous Building Statute, supra, (hereafter 'The Statute'). It gives exclusive original jurisdiction to determine whether a structure is in fact a public nuisance and the need to repair or demolish it. It was sent by certified mail on June 16, 1976 to those interested in the condition of a building at 18-20 India Street, found on Chart 29, Lot 9, Block N (see infra p. 51, 52) of the City of Portland tax assessor's map. The building was solid brick and isolated from its surroundings.

Rudimentary due process is satisfied only by providing the kinds of notice and hearing that are aimed at establishing the validity of the deprivation in question,

see *Fuentes v. Shevin*, 487 U.S. 67, 97 (1972).

The owner must have an adversary hearing, see *Goldberg v. Kelly*, 397 U.S. 254, 262-3 (1970); *Hannah v. Larche*, 363 U.S. 420, 490 (1959); *Morgan v. U.S.* 304 U.S. 1 (1938); *Geftos v. City of Lincoln Park*, 39 Mich.App. 644, 198 N.W.2d 169, 173 (1972); *Misurelli v. City of Racine*, 346 F.Supp. 42, 49 (E.D.Wis. 1972); *In Re Maine Clean Fuels, Inc.* 210 A.2d 736, 746 (Me. 1973).

The notice did not specify any building defects which is required, *State v. Sturdivant*, 21 Me. 9, 13 (1842); *Village of Zumbrota*, 280 Minn. 390, 161 N.W.2d 626, 630 (Supr.Ct. 1968); *Goldring v. Kline*, 284 P.2d 374, 377 (Nev.Supr.Ct. 1955). The notice bound nobody without all the required information, *Sturdivant*, at p. 14; *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). None of the owners could prepare for an adversary hearing. The Petitioner's brother was the only owner that attended. He was an attorney and not a brick mason. The only witnesses were the building inspector and fire chief. The only issue debated was the timing to repair some minor brick work that only posed a remote danger to a trespasser, and was not a public nuisance under Maine law. See *Lewis v. Mains*, 150 Me. 75, 104 A.2d 431, 434 (1954). The

Council decided that the brick work and some broken windows, were repairable, and they voted to give him 30 days to September 8th, although he requested 60 days. The building inspector was not ordered to secure the surrounding area, as required under the local building code and the BOCA Basic National Building Code, if the building was a public nuisance. Despite the 30 day vote and no demands upon the building inspector, one Councilman disregarding due process, warned that he would move to take the matter off the table in two weeks if the repairs were not made.

A certified copy of the record of the August 2, 1976 proceeding was filed in the District Court on February 4, 1986 in opposition to the Respondent's motion for summary judgment, (hereafter 'Motion I'), and is on pp. 85 to 120 in the Appendix submitted with Petitioner's main brief to the First Circuit Court of Appeals, (hereafter App.'). It compiled the Notice of Hearing signed by the Council, dated on June 15, 1976, a cover letter signed by the city clerk dated on June 16, 1976 which was addressed and served by certified mail to all the seven owners, also an affidavit of personal service on the Petitioner by a Maine constable on July 8, 1976, the repair order was not served out nor any notice about subsequent hearings, as required by the statute, (infra p. 49). The Petitioner transcribed the meeting

tape under oath and filed it with another one, officially transcribed (App. p. 228, 595) in the District Court on March 20, 1987 in support of a motion for summary judgment (hereafter 'Motion II').

On August 7, 1976 the 18-20 building was set on fire, causing no damage to the surroundings. A separate adjoining building at 16 India Street also owned by the Petitioner was unscathed. This changed condition triggered an ex parte vote on August 16, 1976 (hereafter 'The Order') to demolish the 18-20 building. *Morgan, supra.* at page 16 ("in view of the changed \*\* condition the secretary vacated the order and granted a rehearing") shows the right legal action the Respondent never took at anytime after the fire which resulted in lawless conduct on December 9, 1979 when the buildings at 18-20 and the adjoining one at 16 was demolished.

## 2. Illegality of The Order

On September 24, 1986 the Respondent responded to Petitioner's first request for admissions under F.R.Civ.P. 36 (App. pp. 185-296), (hereafter 'Admissions'). They were filed in the District Court on March 20, 1987, (App. pp. 188, 252), in support of Motion II. In the Admissions was a response that verified the facts contained in a letter addressed to all the owners dated on August 31, 1976. The letter graciously notified them that the

building at 18-20 was ordered demolished because of the fire, and the September 8, 1976 meeting of which nobody was sent legal notice, would not be held. (App. pp. 188, 252). The Respondent also admitted that the resultant demolition on December 9, 1979 was executed under The Order's authority, (App. p. 198). This admission agreed with Petitioner's affidavit of February 4, 1986 (App. pp. 82, 83) filed against Motion I. A certified copy of the record of this meeting (App. pp. 121-155) was also filed in the District Court on February 4, 1986 in opposition to Motion I. It had The Order, signed by the Council which was recorded by the city clerk on August 30, 1976, The Order cover letter dated on September 16, 1976 which was signed by the city clerk and certified mailed to all the owners with the return receipts, an affidavit of personal service of The Order by a New Jersey sheriff on the Petitioner dated on September 17, 1976.

The Petitioner filed a verified transcript prepared from the tape of the August 16th meeting, (App. pp. 156 - 158), in the District Court on February 4, 1986, that opposed Motion I. The Respondent's attorney denied its accuracy and even denied the existence of the tape in the Admissions, to wit at (App. p. 187): "nor does it possess an electronic recording of them". The city clerk located it in its

normal storage place, after being deposed, and it was then officially transcribed, (App. p. 586-94) and filed with Motion II.

Both transcriptions revealed that a councilman had complained that the owners had not been notified, (App. pp. 156, 589-90). See *Mutton Hill Estates v. Town of Oakland*, 468 A.2d 989, 992 (Me. 1983) ("it is essential to a party's right to procedural due process that he be given notice and an opportunity to be heard at proceedings in which his property rights are at stake"). See also *Newton*, 92 N.C.App. 446, 374 S.E.2d 488 (1988) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The Order was as illegal as in *Michaud v. City of Bangor*, 159 Me. 491, 196 A.2d 186, 189 (Me. 1963) ("We have at this point a vote by the city council of Bangor to do an illegal act"). Michaud's notification of a meeting that ordered his building demolished did not comport with due process standards as defined by this Court. See also *Gordan v. Mullaney*, 317 A.2d 804, 807 (Me. 1974).

### 3. Effect of Dismissing the Appeal

A certified copy of the Notice of Appeal, (infra pp. 50 to 52), was filed in support of Motion I, (App. p. 38). The state court judge dismissed the appeal on December 22, 1978 acting on Respondent's motion under Me.R.Civ.P. 16(d), (infra p. 55) (App. p. 60). Rule 16(d) does not

contain the caveat that a nonspecific dismissal is on the merits as in Me.R.Civ.P. 41(b)(3), (infra p. 57) whose meaning is the same as in the federal rule. see *Lermana v. Inh. of the City of Portland*, 903 A.2d 903,904, n. 2.(Me. 1979). The dismissal's effect is explained in *Lohnman v. General American Life Ins. Co.*, 478 F.-2d 719, 723 (8th Cir. 1973),also *Wilson v. Alderhold*, 89 F.2d 983, 984 (5th Cir.1934):

"Dismissal of an appeal differs materially from an affirmance. Its effect is to remove the impediment to, or stay of proceedings in the trial court which are the consequences of the appeal, *U.S. v. De Pecheco*, 20 How. 261\*\*; *U.S. v. Gomez*, 23 How. 326, \*\*\*, *Newman v. Moyers*, 253 U.S 102 \*\*\*".

The Respondent proceeded at its own peril after the appeal was dismissed as in *Newton, supra*, at page 49 ("thus is liable to plaintiff for any provable damages").

After the City demolished Michaud's building he was not precluded from collaterally attacking the unlawful order, see *Sheiner v. City of New York*, 611 F.Supp. 172, 175 (D.N.Y. 1985) ("lack of jurisdiction over the res. \*\* judgment is void \*\*\* and subject to collateral attack.") See also *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 169-70 (1893).

Michaud sued and collected trespass damages in *Michaud v. City of Bangor*, 169 Me. 285, 203 A.2d 617 (1964), under the

trespass statute, 14 M.R.S.A. § 7552, which enforces The Statute, just as the Civil Rights Act enforces the Fourteenth Amendment, see *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972).

#### 4. Effect of State Court Decision

*Lerman v. Inh. of the City of Portland*, 486 A.2d 903, 904 (Me. 1979) only decided that the superior court could not entertain the appeal because without the record it was invalid. The decision confirmed that the proper procedure was in the nature of a certiorari, as shown in *Jellerson v. Board of Police of Biddeford*, 134 Me. 443, 187 A. 713, 714-715 (1936). The petition was dismissed because Jellerson failed to transmit the record as required. See also *Chavarie v. Robie*, 135 Me. 244, 194 A. 404, 485 (1937), cited in 14 C.J.S., *Certiorari*, § 77, p. 219-220. By analogy under Me.R.Civ.P., 73(a) the trial court clerk has to transmit the record. Contrarily, neither The Statute, nor did Me.R.Civ.P. 80B specify from 1976 through 1979 who should do it. This rule replaced the extraordinary writs and is exclusively used to review governmental action or inaction.

In another certiorari the court succinctly stated the merits could not be reached without the record, see *Ford v. Erskine*, 189 Me. 164, 83 A. 455, 457 (1912) ("That in order that such adjudication be made, \*\*\* the record attacked be

before the court"). See also *People v. Common Council*, 101 N.Y. 82, 4 N.E. 348, 361 (1886):

"The order made by the general term on the return to the writ of certiorari was not *res judicata* as to the validity of the assessment. It did not affirm or reverse the proceedings, but *dismissed* the writ."

Compare the above with *Lerman, supra* at 903 A.2d 904, where the court showed it could not review nor affirm The Order, to wit:

"the record \*\*\* would have been critical to have before the Superior Court in order that it might determine whether it should *affirm*, *annul*, or *alter* the demolition order".

See also *Kirkpatrick v. City of Bangor*, 510 A.2d 320 (Me. 1986) the court said: "Without a record \*\*\* the Superior Court had no means for giving judicial review to the City Council's condemnation of the Kirkpatrick building". The procedure defined in *Lerman, supra* became part of The Statute, See *Winters v. Peoples of State of New York*, 333 U.S. 507, 514 (1948), and substantive. In *Semo v. Goudreau*, 147 Me. 17, 83 A.2d 209, 211 (1951), Maine's highest court endorsed a renewed claim, even though a direct appeal taken in the original action from an unenforceable judgment had been dismissed for failure to transmit the record:

"The defendant failed in its direct attack on the original decree. \*\*. It is to be noted that the appeal was not dismissed on the merits, but because of failure to present the record to the Law Court in accord with a statutory provision which is jurisdictional. The dismissal does not have the effect of an affirmance by this Court of the decree below."

#### 5. Lack of Jurisdiction in State Court

The filing date in the state court of October 25, 1976 compared with the recording or service date of The Order, which could only be ascertained by examining the record, revealed that the appeal was tardy. *Bilodeau v. Soil & Water Conservation Com'n*, 383 A.2d 658, 659-60 (Me.1978), states that subject matter jurisdiction does not attach to a tardy appeal, which cannot be waived by assent of the parties, see *Tibbetts v. Pelotte*, 427 A.2d 956, 958 (Me. 1981), and see *Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978) ("enlargement of a statutorily provided period of appeal is not possible").

The Statute when enacted in 1860, "An Act Abating Nuisances", abrogated the common law and it occupied the field. Its proceedings are strictly pursued and jurisdictional. *Leavitt v. Eastman*, 77 Me. 117, 128 (1885) ("all the statute requirements must be fully and strictly complied with.\*\* no steps in place of those named

in the statute be sufficient.") There is no presumption of jurisdictional facts. See *South Berwick v. York County Com'rs.*, 98 Me. 108, 56 A. 623, 624 (1903), they must be strictly proven by examining the entire record, see *Penobscot R.R. Co. v. Weeks*, 52 Me. 452, 459 (1864). *Small v. Pennell*, 31 Me. 267 (1850) ("A general jurisdiction merely by law, over the subject matter is not enough, they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts that confer it upon them.") This law negates the opinion below's blind ascertainment that the Superior Court had in fact subject matter jurisdiction. The court below should have taken the advice given in *Thompson v. Whitman*, 85 U.S. 457, 459 (1873) (full faith and credit law does not prevent jurisdictional inquiry).

Also see *Worcester v. Briggs*, 504 A.2d 620, 621, n. 2 (Me. 1986) ("Absent data establishing the timeliness of an appeal, the Court is unable to determine the threshold question of jurisdiction"); *Davis v. Bruk*, 411 A.2d 660, 664 (Me. 1988); and *Isely v. Wilkins*, 253 A.2d 51, 53 (Me. 1969), ("The Supreme Judicial Court intended to invest jurisdiction \*\* not upon the filing of notice of appeal, but only upon the filing of the record \*\*"). The 1976 appeal would have been dismissed with or without the record.

## 6. Changed Condition of the Building

The Order was limited to the issue of "fire hazard", see *West v. City of Borger*, 309 S.W.2d 250, 233 (Tex.Ct.App. 1958). The only witness was the fire chief who reported the underlying fact, the building was now "wide open and a fire hazard", (App. pp. 157, 590), but not necessarily a public nuisance. See *Radney v. Town of Ashland*, 188 Ala. 635, 75 So. 25, 26 (Supr.Ct. 1917). Also see *U.S. v. Baltimore & O. Ry.*, 233 U.S. 454, 462 (1935) (the order may be set aside unless it appears the basic finding was made).

Petitioner sealed the building after receiving The Order. A fire captain reported this event on December 14, 1976, (App. p. 251), which said in part: "the building is secure and does not represent a fire hazard". The Admissions at (App. p. 191) confirmed the veracity of the fire captain's report, and also a follow up letter written by Petitioner's attorney, at (App. P. 252). These admissions are conclusive as they were never withdrawn, see *United States v. Kasuboski*, 834 F.2d 1345, 1360 (7th Cir. 1987). The said letter enclosed the report and was sent to the Respondent on December 27, 1976, saying in part:

"I assume that the City is now satisfied \*\* and that it will withdraw the demolition order."

An order is valid only as to existing facts, 46 Am.Jur.2d *Judgments*, § 443, p. 674 ("Res judicata extends only to facts and conditions as they existed at the time the judgment was rendered"), see also 50 C.J.S. *Judgments*, § 650, p.92; *Morgan*, *supra* at page 16; *Whitcomb v. Chaves*, 403 U.S. 124, 161-3 (1974); *Ingraham v. Water Co.*, 82 Me. 336, 19 A. 861 (1898).

#### 7. Public Policy Does Not Burden Victim

*Michaud*, *supra*. at 196 A.2d 107 shows that it is not public policy to force a victim to defend his property from an illegal act in a subsequent proceeding, otherwise the tortfeasor escapes liability

"A copy of this order was delivered to Ramie Michaud on October 24, 1961, who sought no 'appeal' provided for in the ordinance and statute referred to below."

In *Geftos v. City of Lincoln Park*, 89 Mich.App, 644, 198 N.W.2d 169, 175 (Ct.-App. 1972), where plaintiff failed to stop the wrongful demolition nevertheless the court disregarded the defendant's plea of estoppel, as follows:

"To permit defendant's claim of estoppel would be to remove the burden upon the city to act legally in favor of imposing a duty upon an innocent tort victim to force legal action. This we will not do."

*Newton, supra* at p. 492, agreed with *Geftos*, citing further authorities. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972) supports these cases when this Court held that a denial of a guaranteed hearing is not cured by a subsequent proceeding, ("This Court has not \*\* embraced the general proposition that a wrong may be done if it can be undone"). The Respondent should have heeded this Court in *Armstrong supra* at page 552 and *Peralta v. Heights Medical Center, Inc.*, \_\_\_U.S.\_\_\_, 108 S.Ct. 896, 900 (1988) by wiping the slate clean. The public policy shown above conflicts with the court below's unfounded opinion that the Petitioner had to prosecute the appeal.

#### 8. Due Process Nexus on Need to Demolish

In 66 C.J.S. *Nuisances*, § 130, p. 934:

"In exercising their power to abate nuisances, the Courts do not order the destruction of property if it is practicable otherwise to remove the nuisance."

Maine cases articulating this law are *Brightman v. Inh. of Bristol*, 65 Me. 426, 433, 20 AR 711, 714-15 (1875)) and *State v. Sturdivant, supra*, at p. 13; also see *City of Aurora v. Meyer*, 38 Ill.2d 131, 23 N.E.2d 200, 204(Supr.Ct. 1967) and *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.Ct.Civ.APP. 1958), ("property cannot be destroyed if the conditions which make

it a menace can be abated in any other recognized way"). A case factually similar to the one at bar is *Newton v. City of Winston-Salem*, 374 S.E.2d 488, 492 (N.C.Ct App 1988), in which a repair order was followed by an unlawful ex parte demolition order.

"An order to demolish involves a *different* determination, namely that repairs cannot be made \*\*\*. Plaintiff was given no opportunity to be heard on this determination as required by law."

#### 9. District Court Summary Proceedings

The Petitioner filed a complaint in the Federal District Court, District of Maine on December 2, 1985, (App. pp. 14-22). Jurisdiction was based on diversity of citizenship, federal question and civil rights. It clearly alleged facts showing violations of the substantive and procedural rights of due process accorded in The Statute, (App. p. 15). *Michaud* at 196 A.2d 108, held these statutory violations also violated the due process clauses in the federal and state constitutions. Due process violations were also equated with statutory procedure in *Bowles v. Willingham*, 321 U.S. 503, 520 (1944); administrative regulations in *Service v. Dulles*, 354 U.S. 363 (1957), the denial of statutory appeal rights in *Evitts v. Lucey*, 469 U.S. 387, 405 (1985); *Miles v. District of Columbia*, 510 F.2d 188, 193 (D.C.Cir. 1975). Consequently, the complaint sought

to enforce the Fourteenth Amendment and The Statute by claiming damages under 14 M.R.S.A. § 7552 and § 1983.

The Respondent then filed Motion I. The Magistrate (App. pp. 168-174) and the District Court (App. pp. 175-176) ruled that The Order was valid, which partially granted Motion I. The logic (App. pp. 171) was that the state court dismissal was a *res judicata judgment* under case law and should be accorded full-faith-and-credit. Cases cited were *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 466 (1982), *Kradoska v. Kipp*, 397 A.2d 562, 585 (Me. 1979) and *Underwriters Assur. Co. V. North Carolina Guaranty Ass'n.* 465 U.S. 691, 705 (1982). On April 3, 1989 the court below, affirmed but only cited *Kradoska, supra.* and Me.R.Civ.P. 41(b)(3). Cited also was Me.R.Civ.P. 16(h) which did not exist in 1978.

These cases are inopposite to the case at bar. Overlooked was *Davis v. U.S. Steel Supply, etc*, 688 F.2d 166, 172 (3rd Cir. 1982). It says § 1738 only applies to an administrative decision *fully reviewed* by a state court. In *Kremer* it only applies to state court judgments *affirming* administrative decisions, as explained in *Burney v. Polk Community College*, 728 F.2d 1374, 1379 (11th Cir. 1984). These preconditions were not satisfied, § 1738 as applied in *Kremer* did not attach to the case at bar.

*Kradoska, supra* is another enigma, for it shows that an original complaint pursuant to Me.R.Civ.P. 3 could be dismissed sua sponte under Me.R.Civ.P. 41(b)(1) by failing to docket any entries in over two years. So what, Rule 3 is relative to a common law trial court, it has no relevancy to a statutory appeal nor to Rule 80B. The Rule 80B notice of appeal "complaint" is not a pleading that may be dismissed by failing to state a claim under Me.R.Civ.P. 12(b)(6), See *Cumberland Farms v. Maine Milk Commission*, 160 Me. 429, 205 A.2d 539, 543 (1964). Maine's highest court ruled they could not be combined and litigated in a single action, see *Burr v. Town of Rangeley*, 549 A.2d 733, 735 (Me. 1988). In *Kradoska* claim preclusion was applied to a later action, see 397 A.2d 565, 566 "as the issues raised could have been litigated" in the prior case. The sua sponte dismissal was not jurisdictional as there was no bar to the court from reaching the merits. Maine case law that is more factually similar and obviously germane to the case at bar, *Semo and Michaud, supra*, did not accord preclusive effect to an unreviewed, unappealed, unaffirmed, unlawful or unenforceable judgment. The case law above unequivocally repudiates the analogy in the opinion below between *Kradoska* and *Lerman*. Therefore under the law in *Migra v. Warren City School, Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984), *Kradoska* cannot

rationality make § 1738 applicable.

In *Underwriters* at p. 706, the litigant had an opportunity to appear and litigate in an Indiana trial court which rendered the original judgment. This is the same law as in *Kradoska*. In the instant matter the Council was the trial court. It had exclusive original jurisdiction over the issues of public nuisance and demolition versus repair. It rendered the original judgment. Without a hearing on August 16, 1976 the res judicata standard set forth in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) does not apply. Therefore § 1738 could not apply to the purely administrative action on August 16th, as taught in *Kremer*, *supra* at 456 U.S. 480-81;

#### REASONS FOR GRANTING THE WRIT AND SUMMARY REVERSAL

1. THE DISTRICT COURT AND COURT BELOW'S DECISION REPUDIATES THE SUPREMACY OF THE 14TH AMENDMENT AND CONFLICTS WITH THIS COURT AND OTHER COURTS OF APPEALS APPLICATION OF CASES TO STATUTORY CONSTRUCTION

When Motion II was denied, the District Court held at *Lerman v. City of Portland*, 675 F.Supp. 11, 16 (D.Me. 1987):

"Whether indeed the demolition order was vitiated by the subsequent conduct of the parties will determine whether new proceedings in accordance with due process was necessary"

*Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-602 (1948) teaches that subsequent events can vitiate an order, to wit:

"But a subsequent modification of the significant facts \*\* may make that determination obsolete or erroneous at least for future purposes."

The District Court reviewed the papers on file, which included an official transcription of the November 19, 1979 Council meeting (App. p. 567-584) and the city clerk's meeting report (App. p. 442) ("motion to consider order out of order concerning demolition of Lerman Building failed") and made pertinent findings of fact and conclusions of law, that the facts alleged in Petitioner's complaint on lawless conduct after August 16th (App. p. 14) was evidenced by the "dealings" at that meeting. The Petitioner wanted to reopen the basic issues of public nuisance and the need to demolish, with evidence that reflected the building's changed condition as of November 19, 1979, to wit at 675 F.Supp. 16 ("He indicated a desire to present evidence \*\* Tr. 7 \*\*. The Council denied plaintiff's request"). Petitioner also wanted the order lifted as it was an illegal lien on the property and hindered financing to prepare the building for tenancy, (App. p. 572).

At 675 F.Supp. 17:

"The Council to satisfy due process should have allowed Plaintiff to present evidence pertinent to issue of whether the buildings were a nuisance."

Now see *Armstrong, supra* at p. 552, ("\*\* an opportunity [to be heard] *must* be granted at a meaningful time and in a meaningful manner"). Without a full and fair hearing which includes the right to present evidence, denies due process, see *Jenkins v. McKeither*, 395 U.S. 411, 429 (1969). Even if due process had been accorded at the administrative level, *Evitts and Miles, supra* show it was still denied, as the entire statutory procedure applied, including the right to appeal, at 675 F.Supp 17:

"Moreover, if the Court treats the City Council's action at the November 19, 1979 meeting as a new order of demolition. its plain that plaintiff was not afforded an opportunity to appeal the decision because the building was demolished before the full thirty-day statutory appeal period had run".

The above decision is dispositive of the lawless conduct issue after August 16th, regardless of The Order, and does support new claims such as § 1983 or trespass as shown in *Lawlor v. National Screen Service Corp.* 349 U.S. 322, 327-8 (1955).

After deciding that The Maine Tort Claims Act (hereafter 'Act') immunized the Respondent from a trespass claim, § 1983 remained. The jury verdict was patently erroneous on this issue. The District Court jury, see Verdict Form at (infra p. 56) (App. p. 826), had to decide whether a municipality is liable for damages for a due process violation. This issue had already been decided in *Monell v. New York*, 436 U.S. 658 (1978) and *Owen v. City of Independence*, 445 U.S. 622 (1980) which made it clear that municipalities were absolutely liable. The November 19th vote by the Council and the actions resulting from which is squarely within *Owen*, see *Penbauer v. City of Cincinnati*, 475 U.S. 469, 480 (1985) ("No one has ever doubted for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body"). Another theory, which is a lack of a meritorious defense, would not absolve a municipality from liability, see *Peralta*, *supra* at p. 900 and *Michaud*, *supra* at 196 A.2d 107, who collected trespass damages although he had intended to demolish his building, ("[Michaud] \*\* sought permission [from the building inspector] to tear down the building in question"). Also see *Glover v. Housing Authority of City of Bessemer, Ala.*, 444 F.2d 158, 160 (1971). Mrs. Glover was denied an administrative

level hearing prior to being evicted. She lost a later action in the U.S. District Court as she did not have a meritorious defense. This decision was reversed on appeal strictly because she was denied due process. In *Bishop v. Inh. of Rowley*, 105 Mass. 460, 43 N.E. 191 (Supr.Jud.Ct. 1896) a student was summarily expelled from school. A post expulsion determination found it was justified. The decision was reversed by the Massachusetts' highest court, and ordered a damage award, strictly on the basis the student was denied a state right to an education without due process.

The only material facts in the case at bar concerned the Respondent's lawless conduct. You cannot concoct "material facts" such as "the equivalent of conduct manifesting an agreement to suspend the order of demolition" solely to defeat a Rule 56 motion. This ex contractu issue is irrelevant to § 1983, or trespass, which are ex delicto actions, see *Rizzo v. Goode*, 423 U.S. 362, 370-78, 384 (1976), and *Carey v. Piphus*, 435 U.S. 247, 257-8 (1978) which says that § 1983 must be analyzed in accordance with tort principles. This so called material issue was later abandoned. To wit, it was not reported in 675 F.Supp. 11 nor was it on the jury verdict form, (infra p. 56). The opinion below on the trial transcript issue was baffling, since the Respondent

procedurally defaulted under F.R.A.P. 10(b)(3) (infra p. 56). See *Brown v. United States*, 314 F.2d 293 (9th Cir. 1963).

This leads to the issue of municipal tort liability and The Act. A municipality is immune from tort liability for accidental incursions as seen in *Ricker v. Wells Sanitary District*, No. CV 84-84 (Me.Super.Ct. York Cty 1985), (App. p. 720); but not for a premeditated lawless action, as in *Michaud and St. Peter v. City of Presque Isle*. No. CV-79-144 (Me.Super.Ct.Aro.Cty 1979) (The court decided the Act did not immunize Presque Isle from a trespass claim as the demolition was illegal as in *Michaud*) (App. p. 715). A Maine municipality has no lawful right to summarily demolish a building. The Act is not a police power exception to the Fourteenth Amendment which could convert an otherwise lawless to a lawful act, see *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). The Statute is the exclusive remedy as it abrogated the common law.

*Douglas v. Pike Cty*, 101 U.S. 677, 687 (1879) says that a state court's interpretation becomes part of the statute's text. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Taylor v. Jim Walker Corp.* 731 F.2d 266,267 (5th Cir. 1984) and *Tippicanoe Beverages v. S.A. El Aquila Brewing Co.*, 833 F.2d 633, 638-9 (7th Cir. 1987) ruled that inter-

mediate state courts' statutory interpretations are binding on federal courts. The opinion below held that the Act had to be literally construed which would bar a *Michaud* type action. Despite this ruling, the following intermediate state court decisions did not literally construe their sovereign immunity statutes and found municipal tort liability: *St. Peter*, *supra*, *Geftos*, *supra* at 198 N.W.2d 175; *First Nat'l Bank of Dekalb v. City of Aurora*, 71 Ill.2d 1, 15 Ill.Dec. 642, 373 N.E.2d 1326 1331 (1978) (no immunity for violating its own ordinances); *City of Pittsburgh v. Pivirotto*, 502 A.2d 747 (Pa.Cmwlth 1985); *Asiala v. City of Fitchburg*, 24 Mass.App. 13, 505 N.E.2d 575, 578 (1987). This Court agreed with *St. Peter* about exceptions to immunity legislation in *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982): "we provide no license to lawless conduct".

The federal courts below should have been bound by *St. Peter* if not by *Michaud*. The Maine legislature has shown its intent to this day by not repealing The Statute, the legal duty remains intact. If it is not enforceable under 14 M.R.S.A. § 7552, it is meaningless.

The decisions by the federal courts below overturn *Maybury v. Madison*, 5 U.S. 137, 180 (1803) and *Preston v. Drew* 33 Me. 558, 563 (1852) as the Act now abridges the supremacy of the federal and state constitutions. Maine's highest court in

*Preston, supra* and this Court in *Yates v. Milwaukee*, 77 U.S. 497, 505 (1891) warned against a situation that allows the unlawful destruction of property with impunity, which is an absurd result and another reason for not literally interpreting a statute, see *Regger v. Linder Shoe Products Co.*, 241 A.2d 801, 805 (Me. 1968).

The court below should have directed summary judgment as requested. The District Court's published decision and the jury verdict form plainly showed as a matter of law there was an unlawful taking, and the verdict had no legal significance.

2. THE DECISION BELOW CONFLICTS WITH THOSE OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 1738 and RULE 41(b)

The dismissal of the Petitioners state court appeal on December 22, 1978, was not on the merits, (*infra* p. 55). The judge did "otherwise specify", see text of Rule 41(b)(3), as his signature on the motion (App. p. 60), was the grounds, and scope set forth in the motion. Therefore the dismissal was without prejudice. See *Lohman, supra* at p. 722; *Madden v. Perry*, 264 F.2d 169, 174 (7th Cir. 1959) and *Buxton v. Aero Mayflower Transit Co., Inc.* 18 FR Serv2d 342, 344 (4th Cir. 1974):

"the grounds for the motion to dismiss, which may have been well taken

do not go to the merits of the claim, the dismissal should be without prejudice".

See also *Swift v. McPherson*, 232 U.S. 51, 56 (1914).

*Costello v. U.S.* 365 U.S. 265, 284-8 (1960), involved a general sua sponte dismissal in the district court. Failure to employ the "without prejudice" language was not dispositive, because at page 285 "jurisdictional" was defined in Rule 41(b) as:

"those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court going forward to determine the merits of the substantive claim".

The Petitioner failed to perfect his appeal, the dismissal was jurisdictional, therefore it went unappealed as in *Michaud and Moore v. Bonner*, 695 F.2d 799, 801 (4th Cir. 1982) ("state rule does not entitle an unappealed state administrative decision to the full-faith-credit dignity accorded state court decisions"); *Loudermill v. Cleveland Bd. of Educ.* 721 F.2d 550, 559 (6th Cir. 1983) ("Unlike in *Kremer*, the reviewing state court here cannot be understood to have approved or affirmed the administrative adjudication. Rather that adjudication stands unappealed and carries no claim preclusion effect").

Also see *Saylor v. Lindsey*, 391 F.2d

965 (2nd Cir. 1868) (dismissal for failure to comply with court order to post sum was jurisdictional and not judgment on the merits under Rule 41(b)) and *Clegg v. U.S.*, 112 F.2d 886 (10th Cir. 1940) defining merits as not including dismissals based on procedure or jurisdiction.

The opinion below substantially erred by blindly and talismanically, applied Rule 41(b)(3), and 28 U.S.C. § 1738. The court below should have directed summary judgment in favor of the Petitioner as requested, See *Guaranty Trust Co. of New York v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972).JO

#### CONCLUSION

On the basis of the foregoing argument, and the reasons set forth, I respectfully request that this Court grant its Writ of Certiorari and the judgments below be summarily reversed in favor of the Petitioner with instructions that the measure of damages issue be forthwith decided in the court below.

Respectively submitted,

Russell E. Lerman  
Attorney pro se

## APPENDIX

---

### COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS  
For The First Circuit

No. 88-1886

RUSSELL E. LERMAN  
Plaintiff, Appellant

v.

CITY OF PORTLAND,  
Defendant, Appellee,

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE  
[Hon. Gene Carter, U.S. District Judge]

---

Before  
Campbell, Chief Judge,  
Torruella and Selya, Circuit Judges,  
Russell E. Lerman on brief pro se,  
William J. Kayatta, Jr., Elizabeth T.  
McCandless, and Pierce, Atwood, Allen,  
Smoth & Lancaster on brief for appellee,

---

April 3, 1989

---

Per Curiam. The appellant, Russell E. Lerman, brought suit against the City of Portland, Maine. The impetus for the suit was the demolition of the Appellant's buildings on India Street in Portland by the City.

# I

In June 1976, the City notified the appellant that there would be a hearing on August 2, 1976 with respect to property located at 18-20 India Street concerning the alleged dangerous condition of the vacant building thereon. The appellant, as well as ther relatives, held a partial interest in the property. The hearing was held as scheduled. The appellant's brother, a lawyer who also had a partial interest, appeared. The appellant did not. At the hearing, the City Councilors expressed concern primarily about loose and falling brickwork and the building's open and unsecured condition. The appellant's brother asked that the issue be tabled to allow the time to secure, repair, and begin to rehabilitate the building. The Council voted to table the matter until September 8th, with the proviso from one councilman that if the brickwork remained in its dangerous condition after two weeks, he would, in advance of September 8th, move that the matter be taken off the table and that the council vote to demolish the building.

Nothing further is known as to whether any efforts were made to remedy the condition of the brickwork between August 2nd and August 16th. On August 7, 1976, a fire occurred in the building. On August 16, 1976, due to the condition of the building as a result of the fire, the Council voted to suspend the rules, removed the matter from the table, and issued an order of demolition. Neither the appellant nor any other person with an interest in the property had been given any further notification of the Council's intent to review the matter of the property at 18-20 India Street on August 16th. The appellant subsequently was notified of the demolition order and appealed, pursuant to state statute, to the state superior court. He claimed the order was invalid because of various alleged defects in the notification process.

While his appeal was pending in the state court, the appellant attempted to get the city to rescind the demolition order. According to the appellant, city officials led him to believe that an impediment to rescinding the demolition order was the fact that he had less than full title to the property. He, therefore, proceeded to obtain full title. The appellant also obtained several permits from the city and made some repairs to the building. The extent of the repairs and

whether they sufficiently addressed the concerns of the city council are disputed.

The appellant's state superior court action was dismissed on December 26, 1978 because of the appellant's failure to provide the superior court with the record on appeal. That dismissal was upheld by the Maine Supreme-Judicial Court on October 17, 1979. Lerman v. Inhabitants of City of Portland, 406 A.2d 903 (Me. 1979), cert. denied, 446 U.S. 937 (1980). The appellant appeared, unscheduled, at a city council meeting on November 19, 1979 and asked that the demolition order be rescinded so that he could pursue financing for further work. The Council declined to reconsider the demolition order. The building at 18-20 India Street, which was three and one-half stories, was demolished on December 9, 1979. Simultaneously, an adjacent two-story building located at 16 India Street, also owned by the appellant, was demolished as well.

The appellant filed suit in federal district court on December 2, 1985. The appellant alleged that the demolition constituted a deprivation of his property rights without due process under the United States and Maine Constitutions, a taking of his property without just compensation under both Constitutions, violations of 42 U.S.C., §§ 1983 and 1985, and a trespass in violation of 14

M.R.S.A., § 7552. The appellant also claimed the City's actions were intentional and malicious so as to warrant punitive damages, and were unauthorized and carried out in a negligent, reckless, unreasonable and excessive fashion. Finally, the appellant also alleged that the City (along with the demolition company, which defaulted and is not part of this appeal) unlawfully converted the salvaged construction materials and that the City unlawfully assessed the demolition costs against him.

In the course of the pretrial proceedings, the district court ruled that the appellant was barred by principles of res judicata from litigating the validity of the August 16th demolition order. The Court concluded, however, that a due process claim was still viable with respect to his allegation that he was entitled to, and did not receive, a second hearing to establish whether the building was still dangerous, after allegedly relying on City officials' assurances that the order would be reconsidered if he acquired full title to the building and after having undertaken some repairs. The district court also concluded that the due process claim was still viable with respect to the building at 16 India Street. In subsequent pretrial proceedings the state law trespass claims and the taking without just compensation claim

under the federal constitution were dismissed by the district court. Lerman v. City of Portland, 675 F. Supp. 11 (D.Me. 1987).

Trial on the remaining claims lasted ten days. At the close of evidence, appellant's counsel stipulated to the dismissal of all remaining counts except for the counts alleging due process and § 1983 violations. Specifically, the jury found that the appellant was not entitled to recover for failure to provide him required due process procedures after August 16, 1976 and before executing, on December 9, 1979, the demolition order and, further, that the two-story structure (16 India Street) was within the scope of the demolition order. The appellant filed this appeal which he pursues pro se.

## II

The appellant continues to argue that the demoltion order was invalid. That argument is foreclosed, however, by the state court judgment of dismissal of that claim. Kradoska v. Kipp, 397 A.2d 562, 565 (Me. 1979); see also Me. R. Civ. P. 16(h) (dismissal is an appropriate sanction for failure to comply with superior court order) & 41(b)(3) (dismissal operates as an adjudication upon the merits). The appellant's related argument, that res judicata is inapplicable because the state court judgment could not be a valid prior

judgment when the state courts could not have acquired jurisdiction over, in the appellant's view, a void order of demolition, is similarly foreclosed.

The appellant's initial premise, on which his claim of lack of jurisdiction, is based, contains the flaw. His argument is fundamentally grounded in the identical assertion claimed in the state court litigation, i.e., that the demolition order was invalid. The state court had jurisdiction to consider such a claim. See 17 M.R.S.A., § 2852. And, in fact, the appellant sought such review. His theory that the state court had no jurisdiction is viable only if his underlying assertion that the original order of demolition by the City is invalid, is accepted. That claim was conclusively determined against the appellant, even if, as the appellant would have it, erroneously, by a court with the proper jurisdiction to decide such a claim.

Finally, it has not escaped our attention that the appellant's suit existed in the state court system for three years, during the course of which the appellant never raised the issue of the court's jurisdiction. It was only after his case was dismissed because of his refusal to comply with a court order, Lerman v. Inhabitants of City of Portland, 406 A.2d at 904, that he now asserts this

alleged lack of jurisdiction in an attempt to secure collateral review of the demolition order, which review in the state court was aborted by the appellant's unjustified default.

### III.

Prior to trial, the appellant sought summary judgment in his favor on four of his claims; (i) taking of property without just compensation; (ii) denial of due process, (iii) § 1983 violation, and (iv) state statutory trespass. The appellant contends that the district court erred in denying this motion. The argument which apparently is intended to flesh out this contention, however lacks clarity. The appellant does not address these claims individually in any coherent fashion and does not substantiate why the denial of summary judgment was erroneous as to each of those claims in particular. In any event, we find no error in the denial of summary judgment.

#### (i) the taking claim-

Subsequent to the denial of summary judgment in appellant's favor on this claim, the district court, upon motion by the City, dismissed the taking without just compensation claim insofar as that claim invoked the federal constitution. The basis for that dismissal was the appellant's failure to first pursue state

remedies (which the court found existent) for his taking claim. The appellant challenges neither the existence nor the adequacy of state procedures for seeking compensation for an alleged taking. Furthermore, the appellant does not contest the conclusion that he failed to avail himself of that remedy. We, therefore, have no cause to disturb either the dismissal of the claim pursuant to the federal Constitution or the prior denial of summary judgment in the appellant's favor on that claim.

The taking claim under the federal Constitution having been dismissed, what remained of Count II of the appellant's complaint was his claim of a taking of his property without just compensation under the state Constitution. At the close of evidence at trial, however, the appellant stipulated to that Count's dismissal. (Among others, the appellant also stipulated to the dismissal of Count VII. He has therefore waived any argument as to the City's unlawful assessment of the demolition costs against him and we will not consider this argument on appeal.) We conclude, therefore, that nothing of merit remains of the appellant's claim of taking without compensation under either Constitution.

(ii) denial of due process and (iii) § 1983 violation--

The district court denied summary judgment in appellant's favor on these claims after finding that genuine issues of material fact existed as to these claims. In particular, the court concluded that the language of (1) the notice of hearing sent by the city to the appellant (2) the demolition order and (3) the notice of lien were ambiguous as to whether the description therein included both 18-20 India Street and 16 India Street. The notice of hearing described the property as "...located at 18-20 India Street... and more particularly described as Lot 9, Block N, Chart 29 of the Assessor's maps." (Emphasis added.) Lot 9 included 16, 18, and 20 India Street. The demolition order described the property as "...located at 18-20 India Street .... and being further identified as located on Lot 9, Block N, Chart 29 of the Assessor's Maps" (Emphasis added.) The notice of lien described the property as the entire property devised to the appellant.

The district court also concluded that there was a substantial issue of material fact regarding the course of dealing between the parties while the order of demolition was being appealed in the state courts. The court found no express agreement that demolition would not occur if the appellant undertook to cure the deficiencies in the building. The court concluded that the appellant would

have to show the equivalent of conduct manifesting an agreement to suspend the order of demolition. That manifestation was lacking on the appellant's motion for summary judgment to the extent necessary to find for the appellant as a matter of law.

Summary judgment must be denied once the district court determines, as it did here, that a triable issue of fact exists. 10A. C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2728 (1983). We find no error in that determination in this case. Lest there be any doubt as to the formidable burden the appellant bears in convincing us of error in the denial of summary judgment on these claims, we note that these claims subsequently went to the jury, which found against the appellant. The appellant having failed to obtain the trial transcripts, this jury verdict against the appellant on these claims is unreviewable. (The appellant's failure to secure the trial transcripts likewise scuttles his claims of error as to the admission of evidence and jury instruction.) See Fed. R. App. P. 10 and 11. (the appellant has a duty to provide a record sufficient for review).

(iv) state statutory trespass --

In light of (1) the preclusive effect of the state court's ruling on the

validity of the order of demolition, (2) the jury verdict against the appellant on his claims of due process and § 1983 violations subsequent to the issuance of that order, which verdict is unreviewable on appeal due to the appellant's failure to secure the trial transcripts, (3) the dismissal of the claim of a taking without just compensation under the federal Constitution, which we have upheld, supra, and (4) the stipulated-to-dismissal of the remainder of the appellant's claims, (The appellant stipulated to the dismissal of counts alleging a taking of property without just compensation under the state Constitution, a conspiracy in violation of § 1985, intentional and malicious actions warranting punitive damages, unauthorized actions carried out in a negligent, reckless, unreasonable and excessive fashion, unlawful conversion, and unlawful assessment of demolition costs.) the appellant's continued assertion of a meritorious claim of statutory trespass against the city proceeds from a basis we are unable to fathom. In light of the case as it now stands, the city's actions with regard to the demolition of the appellant's buildings would appear, in all respects, to have been conclusively determined to be lawful and authorized. To the extent that some potential life remains in the trespass claim, however, we are not persuaded of its merit.

Subsequent to the denial of summary judgment in appellant's favor on his trespass claim, the district court granted the city's motion to dismiss this claim. The appellant contends that ruling was erroneous as well. Since we find no error in the dismissal of the state statutory trespass claim, we need not address separately the appellant's contention that he should have been granted summary judgment on this claim.

The district court dismissed the state law trespass claim on the ground that the city was immune from suit pursuant to 14 M.R.S.A., § 8103 (the immunity provision of the state Tort Claims Act). That statute states, in pertinent part: "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages." The trespass statute, 14 M.R.S.A., § 7552, does not expressly provide for its applicability to governmental entities.

On appeal, the appellant renews the argument made before the district court. The appellant contends that, prior to the enactment of § 8103 (the immunity provision), the trespass statute had been construed, by judicial decision, as applicable to municipalities. See Michaud v. City of Bangor, 160 Me. 285, 203 A.2d 687 (1964). The appellant argues that this

judicial construction of municipal liability for trespass should be engrafted upon the language of the trespass statute, and therefore survive the enactment of the immunity provision of § 8103.

The district court rejected this argument for a number of reasons. Lerman v. City of Portland, 675 F.Supp. at 13-14. We need not repeat the district court's rationale, which included an analysis of the history of the Maine Tort Claims Act, in its entirety here. We are also aware of conflicting opinions of Maine's lower court as to whether governmental entities are liable for statutory claims of trespass. (We also note Merrill v. Town of Hampden, 432 A.2d 394 (Me. 1981). In Merrill, the Maine SJC affirmed a jury verdict against a plaintiff who had sued a town, pursuant to the trespass statute, for allegedly knowingly or willfully cutting a tree located on plaintiff's land but within the right of way of a public road. The jury found that the plaintiff had not proven his entitlement to damages. There is no reference by the SJC to the issue of governmental immunity for trespass nor do we know whether it was raised in the trial court. we do not find the Merrill case conclusive, therefore, on the issue of municipality's liability to suit for trespass.) Compare Ricker v. Wells Sanitary District, No. CV-84-81 (Me. Super-Ct., York Cty., Aug. 29, 1985) (sovereign

immunity applies to trespass statute) with St. Peter v. City of Presque Isle et al. No. CV-79-144 (Me.Super.Ct., Aro Cty., Oct. 20, 1979)(sovereign immunity is not applicable to trespass statute).

Suffice it to say that the appellant has not persuaded us of error in the district court's conclusion. We, too, find it significant that § 8103 provides for immunity except as otherwise expressly provided by statute, and that it would be an undue stretch in this case to conclude that the judicial construction of municipal liability become part of the express wording of this trespass statute so as to survive the legislative adoption of sovereign immunity.

The appellant's citations to a general proposition do not persuade us otherwise. While a state court construction of the meaning of a state statute has been said to effectively become part of the statute as if plainly written into the statute, we find that proposition inapplicable here. The appellant is not seeking to engraft onto the trespass statute a judicial interpretation of the statute's meaning so as to, for example, save a statute from being unconstitutionally void for vagueness. Moreover, the appellant's argument is not just that we should construe the trespass statute as applicable specifically to municipalities as if that construction was written into

the trespass statute, but that, for purposes of the immunity provision of the state Tort Claims Act, that construction is expressly written into the statute and, therefore, survives a subsequent, unambiguous and very explicit pronouncement of the state legislature that exceptions to governmental immunity are grounded in express statutory authorizations.

"In Maine, sovereign immunity is the rule, and liability for governmental entities the statutorily created, narrowly construed exception," Clockdale v. State Dept. of Trans., 437 A.2d 187. 189 (Me. 1981). Given this state of jurisprudence, as attested to by Maine's highest court, we are not persuaded that the state legislature, in providing for otherwise governmental immunity from suit on tort claims except as otherwise expressly provided by statute, really meant, as the appellant would have it, that immunity is the norm except as otherwise expressly provided by statute or as construed as inapplicable by prior judicial decisions even in the absence of express statutory language authorizing suit against the government. Similarly, we are not persuaded that the appellant's argument would find favor with the Maine Supreme Judicial Court.

## IV

We have considered the remaining points raised by the appellant and find them to be without merit. In light of our disposition, the appellant's argument as to the appropriate measure of damages is moot.

We affirm the judgment of the district court.

Affirmed.

ORDER DENYING REHEARING PETITION

UNITED STATES COURT OF APPEALS  
For The First Circuit

No. 88-1886

RUSSELL E. LERMAN  
Plaintiff, Appellant  
v.

CITY OF PORTLAND,  
Defendant, Appellee,

---

Before  
Campbell, Chief Judge,  
Bownes, Breyer, Torruella and Selya,  
Circuit Judges,

---

ORDER OF COURT  
Entered May 11, 1989

The motion for an extension of time to file a petition for rehearing in banc is granted to permit the filing of said petition as of April 20, 1989.

The petition for rehearing in banc is denied.

By the Court:  
Francis P. Scigliano  
Clerk.

## DANGEROUS BUILDING STATUTE

The following statute, effective in 1976, was filed with the Federal District Court, District of Maine by the Petitioner on February 6, 1986 in opposition to the Respondent's Motion for Summary Judgment, (App. pp. 76, 77).

### Dangerous Buildings

#### 2851. Dangerous buildings.

Whenever the municipal officers shall find a building or structure or any portion thereof or any wharf, pier, pilings or any portion thereof which is or was located on or extending from land within the boundaries of the municipalities, as measured from low water mark, is structurally unsafe; unstable; unsanitary, constitutes a fire hazard; is unsuitable or improper for the use or occupancy to which it is put; constitutes a hazard to health or safety because of inadequate maintenance, delapidation, obsolescence or abandonment or is otherwise dangerous to life or property, they may after notice and hearing on this matter, adjudge the same to be a nuisance or dangerous and may make and record an order prescribing what disposal shall be made thereof.

1. Notice. The notice shall be in writing sent by certified mail to the owner or owners at their last known

address at least 14 days next prior to the date of hearing.

2. Notice how published. When the name or address of any owner or co-owner is unknown or is not ascertainable with reasonable diligence, then the notice shall be published once a week for 3 consecutive weeks prior to the date of hearing in a newspaper generally circulated in the county, or if none, in the state paper.

3. Order. The order made by the municipal officers shall be recorded by the municipal clerk who shall forthwith send an attested copy thereof to the owner or co-owner by certified mail to his last known address, or if the name or address cannot be ascertained, the clerk shall publish a copy of the order in the same manner as provided for notice in subsection 2.

#### 2852. Appeal, hearing

Any person aggrieved by such order may, within 30 days after said order is made and recorded, file an appeal therefrom to any justice of the Supreme Judicial or Superior Court who shall, after notice and hearing, affirm, annul or alter such order and may render such judgment as to costs as justice requires.

2853. Municipal officers may order nuisance abated.

If no appeal is filed, the municipal officers of such municipality shall cause said nuisance to be abated or removed in compliance with their order, and all expenses thereof shall be repaid to the municipality by the owner or co-owner within 30 days after demand or a special tax may be assessed by the assessors against the land on which the building was located for the amount of such expense and such amount shall be included in the next annual warrant to the tax collector of said town for collection, and shall be collected in the same manner as other state, county and municipal taxes are collected.

## NOTICE OF APPEAL

The following Notice of Appeal, filed on October 25, 1976 in the Maine Superior Court, was filed with the Federal District Court, District of Maine by the Respondent on January 13, 1986 in support of its motion for summary judgment, (APP. pp. 38, 39).

STATE OF MAINE	SUPERIOR COURT
CUMBERLAND SS	Civil Action,
	Docket No. 76 1069
RUSSELL E. LERMAN of )	
Dover, New Jersey )	
Plaintiff )	
	)
v. )	NOTICE OF APPEAL
	)
INHABITANTS OF THE )	
CITY OF PORTLAND )	
	)
Defendant )	OCT 25, 1976
	RECEIVED AND FILED
	Edward I. Bernstein, Clerk

NOW COMES the Plaintiff Russell E. Lerman of Dover, New Jersey and complains against the Defendant Inhabitants of the City of Portland pursuant to the provisions of 17 M.R.S.A. § 2852 and Rule 80B of the Maine Rules of Civil Procedure as follows:

1. Russell E. Lerman is the owner of an interest in the premises located at 18-20 India Street, Portland, Maine being located on Lot 9, Block N, Chart 29 of the City of Portland Assessor's Maps.

2. Purportedly pursuant to the provisions of 17 M.R.S.A. § 2851 the Defendant issued an order requiring the premises to be "demolished".

3. The Defendant failed to follow the procedures set forth in 17 M.R.S.A. § 2851.

4. The Defendant failed to follow the provisions of 1 M.R.S.A. § 104A.

5. The premises are not "structurally unsafe; unstable; unsanitary; a fire hazard; unsuitable or improper for the use or occupancy to which it is put; a hazard to health safety because of inadequate maintenance, dilapidation, obsolescence, or abandonment.

6. The Plaintiff is aggrieved by the action of the Defendant.

The Defendant's action does and will deprive the Plaintiff of his due process under the Constitutions of the State of Maine and the United States of America and will result in the unconstitutional taking of property without just compensation in violation of the Constitution of the State of Maine and the United States of America.

WHEREFORE, Plaintiff demands this Honorable Court reverse the Defendant's administrative order and declare it to be null and void.

DATED at Portland, Maine this 25th day of October, 1976.

Respectively submitted,

E. Stephen Murray  
E. Stephen Murray  
Attorney for Plaintiff

STATE OF MAINE  
Cumberland SS, Clerk's Office  
SUPERIOR COURT  
OCT 25 1976  
RECEIVED AND FILED  
Edward I. Bernstein, Clerk

## MOTION TO DISMISS APPEAL

State of Maine	Superior Court
	Civil Action
Cumberland, SS	Docket No.CV-76-1069
RUSSELL E. LERMAN )	
Plaintiff )	
v. )	MOTION TO DISMISS
INHABITANTS OF THE )	
CITY OF PORTLAND, )	
MAINE )	
Defendant )	

1. This Motion is brought pursuant to Rule 16(d) of the Maine Rules of Civil Procedure.

2. On May 30, 1978, a Justice of this Court directed the Plaintiff to complete the Record on Appeal and to file it with the Clerk within 20 days from the date of his order, failure to complete and file the Record on Appeal as directed by the Court would result in dismissal of the action.

3. The Plaintiff has not filed the Record on Appeal as required by the order of the Court.

Wherefore, the Defendants prays that the complaint be dismissed, that it have its costs and for such other and further relief as to the Court seems just.

dated: July 12, 1978.

Charles A. Lane

12/22/78 Motion heard  
Case dismissed  
SS Perkins

Attorney for  
the Defendant

## JURY VERDICT FORM

This form was completed and certified by the jury foreperson in the District Court on January 20, 1988. The remaining questions on damages were not considered and are not reproduced here.

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

US DISTRICT COURT

Portland Maine

1988 JAN 20 PM 3:42

By: VB

DEPUTY CLERK

RUSSELL E. LERMAN )  
Plaintiff )

v. ) Civil No. 85-0374P

CITY OF PORTLAND )  
Defendant )

JURY VERDICT

1. Do you, the jury, find that the Plaintiff, Russell E. Lerman, is entitled to recover for failure of Defendant, City of Portland, to provide to Plaintiff required due process procedures after August 16, 1976 and before executing on December 9, 1979, the Demolition Order?

YES \_\_\_\_\_ NO X

2. Do you, the Jury, find that the two-story structure was within the scope of the Demolition Order of August 16, 1976?

YES X NO \_\_\_\_\_

## DENIAL OF RESPONDENT'S MOTION

This order was filed with a reply brief on December 6, 1988 in the Court of Appeals.

OFFICE OF THE CLERK  
UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

William S. Brownell  
District Court  
Clerk

P.O.Box 7505-DTS  
Portland, Maine 04112  
Tel. (207) 780-3356

October 26, 1988

Russell E. Lerman  
P.O. Box 451  
Dover, NJ 07801

William J. Kayatta, Esq.  
Pierce, Atwood  
One Monument Square  
Portland, ME 04101

RE: RUSSELL E. LERMAN v. CITY OF PORTLAND  
CIVIL NO. 85-0374P

This is to notify you that defendant's Motion for an Order Requiring Plaintiff/Appellant to Order Designated Additional Parts of the transcript has been endorsed by Judge Carter as follows:

10/26/88 - After full review of the written submissions and the Court finding that defendant's designation of additional portions of the record to be untimely filed, the within motion is hereby DENIED.  
SO ORDERED.

Very truly yours,  
*Carole Berry*  
Carole Berry, Deputy Clerk

## Me.R.Civ.P. 41(b)(3)

The following Maine court rule was cited in the opinion below. It is the same as in the federal rule.

(3)*Effect.* Unless the court in its order for dismissal *otherwise specifies*, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.